Commonwealth of Massachusetts
State Ethics Commission

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SUFFOLK, ss.

COMMISSION ADJUDICATORY
DOCKET NO. 499

IN THE MATTER
OF
RAYMOND HEBERT

Appearances: Andrew Lawlor, Esq.[1/]
Stephen P. Fauteux, Esq.
Counsel for Petitioner

William F. Sullivan, Esq.
Counsel for Respondent

Commissioners: Brown, Ch., Burnes, Larkin and McDonough

Presiding Officer: Commissioner George D. Brown, Esq.

DECISION AND ORDER

I. Procedural History

On October 4, 1994, the Petitioner initiated these proceedings by issuing an Order To Show Cause ("OTSC") pursuant to the Commission's Rules of Practice and Procedure. 930 CMR 1.01(5)(a). The OTSC alleged that Raymond Hebert, while he served as the Town of Norton Building Inspector, violated G.L. c. 268A, §3 and §23(b)(3) by his receipt of various gratuities from developers within his jurisdiction and by having private commercial and/or personal relationships with developers under his jurisdiction which he failed to disclose to his appointing authority. Specifically, the OTSC alleged that Thomas Grossi, James Chabot, and Arthur Amaral were developers in Norton who were involved in construction projects in Town during 1990-1991. During this time period, the Respondent allegedly issued various permits to each of these developers and inspected each developer's projects. Allegedly, in July 1991, the Respondent began construction on his private residence at 200 South Worcester Street in Norton. The OTSC alleges that, during the construction of his home, the Respondent accepted a 20% builder's discount for appliances from Grossi, and construction plans, construction framing and excavation services, and 300 feet of waterline from Chabot, in violation of §3. The Petitioner also alleges that, by accepting the builder's discount from Grossi, the plans, services, and waterline from Chabot, and by entering a private commercial relationship with Arthur Amaral to construct his personal residence, at the same time that the builders were subject to his regulation, the Respondent acted in a manner that would cause a reasonable person, having knowledge of the relevant circumstances to conclude that the builders could improperly influence him, or unduly enjoy his favor in the exercise of his official duties, in violation of §23(b)(3).

The Respondent filed an Answer on October 31, 1994 in which he admitted that, from January 7, 1987 until October 3, 1991 he served as the Building Inspector in the Town of Norton, although he denied that he was a municipal employee, as he indicates that, during much of this time his duties were taken away from him. He further admitted that he built a house at 200 South Worcester Street. The Respondent asserted the following affirmative defenses: the action is barred by the statute of limitations; the complaint fails to state a claim upon which relief can be granted; any deficiencies in the Respondent's duties were caused by the actions of the Town of Norton; and any deficiencies in the Respondent's performance of his duties were caused by individuals for whom the Respondent is not responsible. The only affirmative defense which the Respondent pursued prior to hearing was the statute of limitations. The Respondent filed a motion to dismiss on grounds that the conduct was beyond the statute of limitations. 930 CMR 1.01(6)(d).

Commissioner Brown,[2/] in a memorandum and order, denied the motion without prejudice on March 15, 1995. The Respondent has not pursued this matter further during these proceedings.

Pre-hearing conferences were held on December 19, 1994 and February 7, 1995, with Commissioner Brown presiding. At these conferences, procedural issues were discussed, primarily focusing on discovery, scheduling, the motion to dismiss, and the potential admissibility of certain FBI testimony at the adjudicatory hearing, as well as settlement.

An adjudicatory hearing was conducted on March 29, 1995, April 4, 1995, April 5, 1995 and April 19, 1995. At the conclusion of the evidence, the parties were invited to submit legal briefs to the full Commission. 930 CMR 1.01 (9)(k). The Petitioner and Respondent submitted briefs on October 19, 1995. The parties presented their closing arguments to the full Commission on March 22, 1996. 930 CMR 1.01(9)(e)(5). Deliberations began in executive session on March 27, 1996. G.L. c. 268B, §4(i); 930 CMR 1.01(9)(m)(1). Deliberations were concluded on April 29, 1996.

In rendering this Decision and Order, each undersigned member of the Commission has considered the testimony, evidence and argument of the parties, including the hearing transcript.

II. Findings of Fact

1. Between January 1987 and October 3, 1991 Raymond Hebert held the position of Building Inspector and Zoning Enforcement Officer in the Town of Norton. Specifically, during the months of July, August and September, 1991, Hebert performed the duties of Building Inspector. Hebert's appointing authority was the Executive Secretary of the Town of Norton. While Hebert served as the Building Inspector he received salary and benefits from the Town of Norton.

2. The purpose of the state building code is to provide a minimum standard of safety for people using and occupying structures.[3/] A local building inspector enforces the building code through the issuance of permits, inspections during construction, and the investigation of complaints by citizens. A local building inspector may refuse to issue a permit for noncompliance with the building code or zoning ordinance.

3. Raymond Hebert, as Building Inspector, oversaw all private building construction in Norton, and his duties included enforcement of the state building code.[4/] If Raymond Hebert, during his tenure as Building Inspector, found some defect or violation of the building code, he had the authority to order corrections made, or to halt the construction.

4. A building inspector conducts several inspections to determine whether construction is in compliance with the building code. The basic inspections include the foundation inspection, framing inspection, insulation inspection, and occupancy inspection. Additional inspections, in the building inspector's discretion, may be performed while construction is progressing.

5. Raymond Hebert conducted foundation inspections, framing inspections, insulation inspections, and occupancy inspections for housing construction in Norton, during his tenure as building inspector.

6. To obtain a building permit, one must submit an application, appropriate set of construction plans, municipal fee, and other required approvals, such as septic system approval, zoning approval, street opening permits. While he served as Building Inspector, Hebert assisted builders and others in completing permit applications.

7. As Building Inspector, Hebert reviewed construction plans at the beginning of construction to determine that construction would comply with the local zoning ordinances.

8. Raymond Hebert, as Building Inspector, issued foundation permits which permitted a contractor to dig a foundation.

9. Raymond Hebert, as Building Inspector, performed foundation inspections. Foundation inspections involve looking at the soil conditions, footings and foundation at the building site to determine whether the footings meet the requirements of the plan, whether the footings are installed properly and whether there are soil problems that have not been addressed by the contractor.

10. As Building Inspector, Hebert made the decision whether or not to issue building permits to builders in Norton.[5/] A builder cannot begin construction until a building permit had been issued. When deciding whether to issue a building permit, Hebert interpreted the state building code requirements, and the local zoning ordinances. Hebert did not issue a building permit in all cases.

11. During construction a building inspector performs a rough framing inspection. During the rough framing inspection, the building inspector reviews the frame construction of the house before the insulation and sheetrock are applied to determine the appropriate size, and spacing of the structural members and whether proper materials were used for siding, flooring, sheathing, framing, and roof framing.

12. During construction, the building inspector performs an insulation inspection to determine whether the amount of insulation installed is of the proper thickness and proper heat resistance, and whether the method of installation is proper.

13. The occupancy inspection is the final and most important inspection in construction, and is the only inspection required under the state building code. In the final occupancy inspection, a building inspector must determine whether the building is substantially complete, constructed according to the building code, and safe for occupancy.

14. Following the occupancy inspection, the building inspector issues an occupancy permit certifying that the building is safe for occupancy.

15. Raymond Hebert, as Building Inspector, had the authority to deny issuance of an occupancy permit.

16. In financing a new house construction, banks generally require a certificate of occupancy.[6/] If the building inspector does not issue an occupancy permit, transfer of the property from builder to homeowner may be delayed. A delayed occupancy permit can have economic consequences for a developer, including delayed sale of the property.[7/]

17. If a building inspector finds a violation of the local zoning ordinance he is required to notify the appropriate person, and if the violation is not corrected, a building inspector can suspend the building permit until the zoning violations were adequately addressed.

18. During 1990 and 1991, Hebert had disputes with the builders in Norton.[8/]

19. Hebert began construction of a house on a piece of property he owned at 200 South Worcester Street in late July or early August 1991.

20. In 1990-1991, Thomas Grossi was engaged in the business of purchasing property and building houses through the business entity FAL Inc.

21. In 1991, Raymond Hebert, as Building Inspector, issued the following permits to Thomas Grossi, his wife Dora Grossi, or FAL Inc.:

Foundation Permit, 162 Woodland Road (April 17, 1991); Building Permit, 162 Woodland Road (April 23, 1991); Occupancy Permit, 162 Woodland Road (July 24, 1991); Building Permit, 10 Island Road (July 3, 1991); Foundation Permit, 6 Cedar Road (July 31, 1991); Building Permit, 6 Cedar Road (July 31, 1991).

22. As Building Inspector, Hebert performed the foundation, framing, insulation, and occupancy inspections for the construction at 162 Woodland Rd. and 10 Island Rd., and he performed the foundation, framing, and insulation inspections for 6 Cedar Road.

23. As Building Inspector, Hebert had declined to issue Grossi permits for two contiguous lots.

24. While he was a Building Inspector and while he was building his house, Hebert knew Grossi was a developer in Town who was likely to come before him for permits and inspections in the future.

25. Mr. Grossi offered to purchase the appliances for Hebert's house through the account of a friend, Kelly Lewis, at Caloric Appliance Company. In 1991, Kelly Lewis, a real estate agent, had an account at Caloric Appliance

Company that permitted her to purchase appliances at a discount.

26. During the relevant time frame, the Caloric Appliance Company operated a wholesale warehouse which provided a discount on the purchase of major appliances to customers, such as appliance dealers, builders, and apartment managers and others in the trades who opened an account. There was no cost to open an account at Caloric Appliance Company. According to industry practice, the wholesale discount averaged 25% from the retail prices.[9/]

27. Hebert accepted Grossi's offer to obtain appliances for his house at a discount from Caloric Appliance Company.

28. Grossi utilized Kelly Lewis' account to purchase a stove, refrigerator, dishwasher and range hood for Hebert's house.[10/] Grossi paid approximately $930 for the appliances.[11/]

29. Grossi charged Hebert what the cost to Grossi was and Hebert reimbursed Grossi for 100% of the cost.

30. Hebert received a discount on the appliances from the retail price.[12/]

31. Grossi offered to use his truck to pick up the appliances from the warehouse in Taunton. Hebert accepted Grossi's offer to use Grossi's truck. Hebert and Grossi took Grossi's pick-up truck to obtain the appliances from the warehouse. Grossi did not charge Hebert for the use of the pick-up truck, and Hebert did not pay for the use of the truck.

32. Grossi has known Raymond Hebert and his family since Hebert was 14 or 15 years old.

33. Grossi became social friends with Hebert in 1988-1989 when Grossi began buying property in Norton.

34. In 1990-1991, Grossi met Hebert for lunch approximately three times each week.

35. Grossi attended several social events with Hebert during the relevant time period, and had been a guest at Hebert's apartment.

36. Grossi and Hebert considered themselves to be personal friends.

37. After Hebert was terminated as Building Inspector, the friendship continued and became closer. After the termination, Grossi lent Raymond Hebert money for Hebert's living expenses.

38. In 1990-1991, James Chabot was a partner in J & R Enterprise, Inc. ("J&R"). J & R is a corporation organized to build homes for a profit. Chabot's partner in 1990-1991 was Ronald Coolidge who, at the relevant time, was the Alternate Building Inspector in Norton.

39. In 1990-1991, J & R built approximately 10 houses per year in Norton.[13/]

40. In 1990-1991, Hebert issued J & R the following permits:

building, foundation, occupancy permits for 312A South Worcester Street (June 25, 1991, June 25, 1991, September 4, 1991); building and foundation permits for 320A South Worcester Street (June 25, 1991; June 25, 1991); foundation, building and occupancy permits for 5 Fordham Drive (June 25,1991, June 25, 1991, Sept. 11, 1991); foundation, building and occupancy permits for 18 Fordham Drive (April 8, 1991, April 8, 1991, May 23, 1991); foundation, building and occupancy permits for 1 Island Road (December 21, 1990, February 1, 1991, February 26, 1991); building and occupancy permits for 8 Fordham Road (February 5, 1991, March 29, 1991); foundation, building and occupancy permits for 115 Barros Street (April 11, 1991, May 15, 1991, July 29, 1991); building permit and occupancy permit for 58 West Hodges Street (September 24, 1990; November 15, 1990).

41. As Building Inspector, Hebert performed all of the inspections in connection with the above permits.

42. Hebert began building his home at the same time that J & R was building a house at 5 Fordham Drive, Norton.

43. As Building Inspector, Hebert granted all of the permits for and performed all the inspections for 5 Fordham Drive.

44. At the time Hebert was building his house, he knew that Chabot was a builder in Norton, and that Chabot would likely appear before him, as Building Inspector, for permits and inspections in the future.[14/]

45. At the construction of 8 Fordham Drive, Hebert required J & R to remove a deck from the house in order to obtain an occupancy permit, based on Hebert's interpretation of the zoning ordinance in Norton. Chabot and Coolidge disagreed with Hebert's interpretation of the zoning requirements for 8 Fordham Drive.

46. Hebert's refusal to issue an occupancy permit until action was taken regarding the deck delayed sale of the property at 8 Fordham Drive. J & R lowered the price of the house at 8 Fordham Drive as a result of removing the deck off the house.

47. Following a citizen complaint regarding water in a cellar hole, Hebert, as Building Inspector, issued a temporary cease and desist order at the 58 West Hodges Street J & R construction site.

48. At J & R's request, Hebert, as Building Inspector, wrote a letter, dated November 14, 1990, ordering stone veneer to be removed from the property. J & R requested the letter because Chabot and Coolidge were concerned about the liability of J & R for the veneer which they had not placed on the house.

49. At 1 Island Road, Hebert was going to decline to issue an occupancy permit. Hebert and Chabot had a disagreement over the interpretation of the building code relating to a basement door. Chabot convinced Hebert that Hebert's interpretation of the building code was incorrect.

50. In late April or May 1991, Hebert arrived at the J & R job site at 18 Fordham Drive for an inspection. Chabot had not expected to see Hebert that day and had not requested an inspection.

51. During the course of that inspection Hebert requested a copy of the construction plans for the house on 18 Fordham Drive. Chabot had drawn the plans for 18 Fordham Drive on the computer in his office, by modifying other plans for a prior house.

52. Chabot gave Hebert a copy of the plans and permission to use the plans. Chabot did not charge Hebert a fee for the plans and Hebert did not pay for the plans.

53. Hebert used the plans in the construction of his home.

54. The house at 18 Fordham Drive passed all of Hebert's inspections.

55. On two or three weekends, Chabot stopped by Hebert's job site at 200 South Worcester Street, and volunteered his assistance. At the Hebert job site, Chabot assisted in pre-cutting parts, putting two walls together and building a second floor wall, and using an excavator owned by J & R to backfill around Hebert's foundation.

56. Chabot considers himself an expert framer.[15/]

57. The "going rate" of pay for a framer is $15-$20 per hour.[16/]

58. Chabot spent 16 hours performing framing services at Hebert's job site.[17/] Chabot spent an additional two to four hours providing backfilling services at Hebert's job site.

59. The value of Chabot's services to Hebert was at least $320.[18/]

60. Chabot did not charge Hebert for his services at the construction site and Hebert did not pay Chabot for the services.

61. Hebert purchased waterline for $111.59 for his home.

62. The amount of waterline Hebert purchased was insufficient to finish the construction at 200 South Worcester Street.[19/]

63. At Chabot's job site on Margaret Drive in Norton, Hebert and Arthur Amaral asked Chabot if they could borrow waterline for use in the construction of Hebert's house, and return the coil later.

64. Chabot supplied them with a 300 foot coil of 1" copper tubing waterline, and expected Hebert to return a similar coil of waterline. The value of the coil of waterline was between $100-$200.[20/]

65. Hebert did not pay for or return a similar coil.

66. In 1991, Chabot was also a Planning Board member in Norton. As a Planning Board member, Chabot had an ongoing relationship with Hebert, as the Building Inspector, regarding matters before the Planning Board.

67. Hebert met Chabot for the first time after Hebert became Building Inspector. Chabot considered himself to be a friend, but not a close friend of Hebert's. Chabot considered his dealings with Hebert to be more business than social in nature.

68. Chabot and Hebert had never been to each other's homes. Chabot had lunch or dinner with Hebert on several occasions in seven or eight years, and had attended one seminar with Hebert, but had never attended family gatherings, sporting events or cultural events with Hebert.

69. Arthur Amaral has conducted his construction business through Norton Construction Company and through Doral Realty Trust.

70. During 1990-1991, Arthur Amaral was issued the following permits by Raymond Hebert, as Building Inspector:

Building Permit, 6 Harvey Street (September 30, 1991); Occupancy Permit, 6 Harvey Street (October 2, 1991); Building Permit, 4 Harvey Street (November 12, 1990); Occupancy Permit, 4 Harvey Street (May 6, 1991).

71. As Building Inspector, Hebert conducted inspections of Amaral's work.

72. As Building Inspector, Hebert cited Amaral for a building code violation regarding a foundation.

73. Hebert, while he was building his home, knew Amaral was a builder in Norton, and that it was likely that Amaral would appear before him in the future for permits and inspections.

74. During mid-winter 1991, Hebert discussed with Amaral a plan in which Amaral would act as general contractor and build a house for Hebert.[21/] In exchange for these services, Hebert agreed to pay Amaral between $41,000 and $45,000.[22/]

75. The agreement between Hebert and Amaral was oral and not reduced to a writing.

76. Hebert paid Amaral by several checks and with substantial cash payments. Hebert did not pay Amaral the total agreed upon price.[23/]

77. Amaral performed all of the site work, helped clear trees, excavated the foundation hole, excavated the septic system holes, framed the majority of the house, hung the drywall, did the finish carpentry, and built the decks. When Amaral stopped work at the job site, the house was substantially complete.

78. Hebert and Amaral were good friends. This friendship began before Hebert became Building Inspector.

79. Hebert met Amaral on a social basis five to six times per week.

80. Hebert served as the "best man" at Amaral's wedding.

III. Decision

The Petitioner has alleged violations of G.L. c. 268A, §3 and §23(b)(3). As a preliminary jurisdictional matter we must decide whether Raymond Hebert, at the relevant time, was a municipal employee subject to G.L. c. 268A. G.L. c.268A, §1(g) defines "municipal employee" as

> a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.

The Respondent has admitted that he was the Building Inspector and Zoning Enforcement Officer for the Town of Norton ("Town") between January 1987 and October 3, 1991 and that he was the Building Inspector in July, August, and September 1991 when he was involved in constructing his home. However, in his Answer, the Respondent denied he was a municipal employee as he had been relieved of his duties for much of the time.

We conclude that Raymond Hebert was a municipal employee who was subject to the conflict law. He admits that the position of Building Inspector and Zoning Enforcement Officer is a position in the Town and that he was charged with regulating private construction in the municipality and interpreting the local zoning bylaw. He admitted that the position was an appointed position and that he received the salary and benefits of a Town employee. He further admits that he held these positions between January 1987 and October 3, 1991. During the most relevant three months, July, August, and September 1991, he performed his duties as Building Inspector by issuing permits and conducting inspections.[24/] Accordingly, for the relevant time period of 1990-1991, we find that Raymond Hebert was "a person performing services for or holding an office, position, employment or membership in a municipal agency."

A. Section 3

Section 3(b) provides, in relevant part, that a municipal employee may not, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, ask, demand, exact, solicit, seek, accept, receive or agree to receive anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him.

The term "substantial value" first appeared as part of the comprehensive 1962 conflict of interest legislation that created c. 268A. In response to the need for a comprehensive law covering all employees and to address the major kinds of conduct which might create either a conflict of interest or the appearance of conflict, the General Court established a special study commission in 1961 to draft and recommend appropriate legislation. The special commission modeled much of its work on drafts of similar legislative initiatives pending in Congress. The special commission was guided by two objectives: that the proposed legislation address corruption in public office, inequality of treatment of citizens, and the use of public office for private gain; and that the proposed legislation set realistic and precise standards so that the Commonwealth, counties, and municipalities may continue to attract capable individuals who are willing to serve in government. Final Report of the Special Commission on Code of Ethics, H. 3650 at 18 (1962).

The General Court did not establish a statutory dollar amount for substantial value. Subsequently, in *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976), the Massachusetts Appeals Court opined that it would be "difficult to conceive of circumstances in which $50... could not be found "substantial" in the context of §3(b)." The Commission relied upon the *Famigletti* decision when it established a $50 threshold as a guideline for public employees who are offered gifts, meals, or other benefits during the course of their official employment. See *In re Michael*, 1981 SEC 59,69; *Commission Advisory No. 8 (Free Passes)* (1985). In *EC-COI-93-14*, the Commission re-affirmed its decision that substantial value is $50 or more. The term "substantial value" is not limited to cash gifts and, for example, has been interpreted to include discounts (*In re Michael*, 1981 SEC 59), pavement of home driveway (*In re Murphy*, 1992 SEC 613); services of painter for apartment interior (*In re Shay*, 1992 SEC 591), carpentry services for personal residence (*In re Stanton*, 1992 SEC 580).

In its determination of whether a "for or because of" nexus exists between a public employee's official actions and a gratuity, the Commission has stated

> To establish a violation of §3(b) the Petitioner need not demonstrate either a corrupt intent in an employee's conduct or an understood "quid pro quo" between the receipt of the thing of substantial value and the performance

of official acts. (citations omitted) Further, there need be no showing that the performance of any official acts was in fact influenced by the receipt of the thing of substantial value. Under 3(b) the petitioner must establish a relationship between the solicitation or receipt of the thing of substantial value and the performance of an employee's official acts...

In re Antonelli, 1982 SEC 101, 108.

In essence, we have evaluated whether the public employee is in a position to use his authority to assist the donor, whether the donor has substantial interests that have or may be expected to come before the public employee, and whether the official has a prior relationship with the donor. See *EC-COI-92-19; 91-14; 85-42; In re Mahoney*, 1983 SEC 146. If the public employee has a prior private relationship with a donor, the evidence must establish that the friendship or private relationship is the motive for receipt of the gratuity. *In re Flaherty*, 1990 SEC 498, 499 and n.6.

The Ethics Commission's position that no "quid pro quo" is required to be proven is consistent with precedent from the Massachusetts courts. See *Commonwealth v. Dutney*, 4 Mass. App. Ct. 363, 375 (1976) (showing of corrupt intent not necessary for conviction under §3). Federal courts, interpreting similar language in the federal gratuities statute (upon which §3 was based), have also concluded that neither a specific intent on the part of the donor or donee is required nor a "quid pro quo". See e.g., *United States v. Bustamante, 45 F.3d 933, 940-941 (5th Cir. 1995);*[25] *United States v. Niederberger*, 580 F.2d 63, 69 (3rd Cir. 1978); *United States v. Evans*, 572 F.2d 455, 479 (5th Cir. 1978); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976). As articulated by the *Evans* court, "it is not necessary that the official actually engage in identifiable conduct or misconduct nor that any special `quid pro quo' be contemplated by the parties nor even that the official actually be capable of providing some official act as `quid pro quo' at the time." *Evans*, 572 F.2d at 479.

1. Thomas Grossi

The Petitioner alleges that, during 1990 and 1991, Thomas Grossi was developing and building houses in the Town of Norton which required various permits and inspections by the building inspector. While Raymond Hebert was constructing his home in the late summer of 1991, Grossi arranged for Hebert to obtain a discount, in excess of $50, on appliances through a friend of Grossi's and Grossi and Hebert used Grossi's truck to deliver the appliances to Mr. Hebert's house.

Hebert admits that Grossi appeared at the house site and offered to purchase Hebert's appliances through the account of Grossi's friend at a wholesale warehouse. Mr. Hebert also admits that he permitted Grossi to make these arrangements and he accepted Grossi's offer that he and Grossi use Grossi's pick-up truck to obtain the appliances. He admits that he paid Grossi in full for the appliances and he agrees that he received a discount on the appliances from the retail price.

The Respondent contends that Grossi offered his assistance with the appliances because of a longstanding friendship between the two men.[26] The Petitioner counters with the argument that Grossi's assistance in obtaining the discount was to obtain good will with the Building Inspector.

Raymond Hebert knew that Grossi was a developer in Norton. During the summer of 1991, Raymond Hebert took official actions regarding Grossi's building projects.[27] There was substantial testimony regarding the duties of a building inspector from Paul Piepiora, a state building inspector, whose area includes Norton, and from Raymond Hebert. From this testimony a reasonable inference can be drawn that a building inspector is in a position to exercise discretion and enforcement powers in connection with a developer's construction project in a manner that could create expense and delay for the developer. Hebert also testified that, while he was Building Inspector, he knew it was likely that Grossi would come before him in the future for building permits, and he knew it was likely he would have to do inspections on Grossi's properties.

However, there was substantial testimony concerning the friendship between Grossi and Hebert. Grossi testified that he knew Hebert since he was 14 or 15 years old and Grossi frequented the cafe where Hebert's mother worked. He became social friends with Hebert in 1988-89 when he started buying property in Norton. In 1990-91 Grossi estimates he went out to lunch with Hebert approximately 3 times a week. He also attended other social occasions with Hebert, such as a New Year's Eve party, Hebert's birthday party, Arthur Amaral's wedding. On occasion, Hebert and Grossi had spent the night at each other's homes. Each man considered the other to be a friend. Of significance, they became closer friends after Hebert was terminated as Building Inspector. They spent more time together and

Grossi provided Hebert with an unsolicited loan to help Hebert with his expenses.

We find that Grossi and Hebert's testimony regarding their relationship is credible. We conclude that the friendship was the motive for Hebert's acceptance of the discount. Accordingly, the Petitioner has not proven, by a preponderance of the evidence that Hebert, while Building Inspector, accepted a gratuity for or because of any official action or action to be performed. Therefore, G.L. c. 268A, §3 has not been violated.[28/]

2. James Chabot

The Petitioner alleges that Hebert accepted construction plans, 300 feet of waterline, and assistance with framing and excavation at his home from James Chabot in violation of §3.[29/]

i. Construction Plans

Hebert admitted, in his testimony, that he asked Chabot for a copy of the construction plans that Chabot had prepared for 18 Fordham Drive and that he did not pay for the plans. Chabot testified that this solicitation occurred, on one weekend day in late April or May 1991, when Hebert arrived unexpectedly at the job site at 18 Fordham Drive for an inspection. Chabot gave Hebert permission to use the plans and Hebert used these plans in the construction of his home. Chabot had originally prepared these plans for 18 Fordham Drive on the computer in his office, by modifying other plans for a prior house.

Although both parties agree that a copy of construction plans was given to Hebert, there is a question whether the state of the evidence is such that the Commission could ascertain by a preponderance of the evidence, whether the plans are an item of substantial value.

Based on the state of the evidence before us, we conclude that the Petitioner has not met its burden of proof. There is insufficient reliable and credible evidence from which we can find that the construction plans are an item of substantial value.

Mr. Piepiora, the state building inspector, was asked what the typical cost of an architectural set of drawings for a single family house would be and he responded with a guess "I really don't know what the cost would be I would suspect, my guess, would be they could range from $200 to $800 depending on the level of detail. I really don't know." We do not find that Mr. Piepiora has the requisite knowledge or expertise to provide an opinion regarding the value of construction plans. Additionally, his answer was not framed within the context of the particular plans at issue.

Mr. Chabot testified that he spent an estimated eight hours preparing the plans. He testified that he had a gross income of $140,000 per year, based on an average 10 hour workday. Petitioner asks us to use these figures to find that the cost of Chabot's time to prepare the plans was $40 per hour. However, Chabot testified that he does not charge to prepare plans, nor does he charge clients by the hour. He charges the client a package deal for the construction of a home and does not know the value of his services to prepare a plan. Mr. Chabot's former business partner, Ronald Coolidge, testified that he did not know the value of the copy of the plans. We consider the hourly rate a hypothetical figure and, given Chabot's testimony, we do not find that the rate has sufficient indicia of reliability for us to draw a reasonable inference of value. Accordingly, we conclude that the Petitioner has not proven, by a preponderance of the evidence, that acceptance of the construction plans was an item of substantial value, violative of §3.[30/]

ii. Construction Services

Hebert, in his testimony, acknowledged that Chabot worked on his home on some weekends, that he assisted in putting up the second floor wall, assisted in framing, and assisted in backfilling. Hebert admitted that he did not pay Chabot for these services. Chabot testified that he stopped at Hebert's building site to "give him a hand" in the initial framing on two or three weekends. He assisted in pre-cutting parts one day, assisted in putting a couple of walls together, and worked on building the front second floor wall. Chabot also testified that, on one weekend, he provided the use of his excavator and backfilled around Hebert's foundation. Chabot estimated he spent 2-4 hours backfilling at Hebert's house. He spent 16 hours framing Hebert's house.

Chabot testified that, in his experience with hiring framers at J & R, the going rate of pay was $15-$20 per hour. We find that Chabot's testimony, based on his personal experience at J & R and his knowledge of the construction

trade regarding the rate of pay for framers, is credible and reliable. We conclude that Hebert received services from Chabot valued, at a minimum, at $320, and that these services constituted an item of substantial value under §3.[31/]

The Respondent argues that, even if the services are of substantial value, the services were not given "for or because of official acts." He asserts that Chabot helped him "for the fun of it" and that building his house was similar to a "barn raising". We do not find this testimony credible. Although Chabot testified that he considered Hebert a friend, he characterized the relationship as more business than friendship. The relationship did not develop until after Hebert became Building Inspector. They did not go to each other's homes and their social interactions were infrequent. There is no evidence that the friendship continued or became stronger after Hebert was terminated as Building Inspector. We note that, in the year after Hebert was terminated as Building Inspector, Chabot and Hebert ran against each other for the office of selectman. On this evidence, we are unable to draw a reasonable inference that the services were received by Hebert because of friendship.

Chabot was a developer who, in 1990-1991, did a significant amount of construction business in Norton.[32/] In 1990-1991 Hebert issued J&R its permits, inspected its properties, and issued the occupancy permits.[33/] Significantly, J & R was building a house at 5 Fordham Drive during the same time period that Hebert was building his house. Hebert performed all the inspections and granted all the permits for 5 Fordham Drive. Hebert testified that, at the time he was building his house, he knew Chabot was a builder in Town, he knew it was likely in the future that he would be issuing permits and inspecting Chabot properties.

We recognize that a local building inspector has substantial regulatory authority over local builders and developers. As Mr. Hebert acknowledges, building inspectors may decline to issue building permits, thus preventing the start of construction. Raymond Hebert, as Building Inspector, at times, declined to issue a building permit or an occupancy permit. Building inspectors may halt or shut down construction, creating delay and expense for builders. The denial of an occupancy permit can delay the sale of the property. Building inspectors also exercise discretion in the thoroughness of their inspections and in their interpretation of the language and requirements of the building code or local zoning ordinance.

Hebert admitted that (in 1990 and 1991) he "crossed swords" and had disputes with builders over the interpretation of the building code. Chabot testified that he tried to avoid Hebert when Hebert was in a "bad mood." Hebert had made decisions against J&R's financial interest. At 8 Fordham Drive, Hebert required J&R to remove a deck from the house in order to obtain an occupancy permit, which upset the principals at J&R. Additionally, he issued a cease and desist order temporarily at West Hodges St. after a complaint of water in a cellar hole. A dispute had also arisen over the occupancy permit for 1 Island Rd, which was issued at the end of February 1991.

Hebert also assisted Chabot and took official actions which benefitted J&R. J&R requested that Hebert write a letter to the owner of the West Hodges St. property, who had put stone veneer on the front of the house.[34/] Hebert wrote the letter, dated November 14, 1990.

On the basis of this evidence, we find that Chabot had substantial interests in matters coming before Hebert and that Hebert was in a position to and did exercise authority over Chabot before and during the time that Hebert accepted free construction services. See *EC-COI-92-19; 91-14; 85-42*.

As a defense, Hebert denies that he was in a position to give Chabot favors or that he treated Chabot differently from other developers in Norton, or that he gave some developers preferential treatment. We agree that there is no evidence that Hebert gave Chabot a quid pro quo in exchange for his services. To find a violation of §3, proof of a quid pro quo is not required or necessary. See e.g., *United States v. Bustamante*, 45 F.3d 933, 940-941 (5th Cir. 1995); *In re Antonelli*, 1982 SEC 101, 108. Therefore, we reject Hebert's defense.

We find, by a preponderance of the evidence, that Hebert received construction services for his personal benefit from Chabot for or because of his official actions or actions to be performed.

iii. Waterline

Chabot testified that, while he was on a job site on Margaret Drive in Norton, he was approached by Hebert and Amaral. He was informed that they were installing waterline at Hebert's house, had discovered that they did not have sufficient line to complete the work, and questioned whether they could borrow some waterline and return the coil later.

Chabot supplied them with a 300 foot coil of 1" copper tubing waterline. He estimated the value at between $100-$200. Chabot gave Hebert the coil of waterline and asked him to return a similar coil. Hebert did not return the coil.

Hebert testified that had no knowledge of borrowed waterline. He stated that he prepared a check for $111.59 for waterline and that the plumber took the check to the store and purchased the waterline.

We find Chabot's testimony credible and not inconsistent with Hebert's testimony. While Hebert purchased waterline, Chabot testified that he provided waterline because the amount Hebert had was inadequate.

Additionally, we find Chabot's testimony regarding the value of the waterline credible and reliable, given the cost to him and his substantial experience building homes, all of which would require waterline. We find that the waterline Hebert received from Chabot was of substantial value for purposes of §3. For the reasons stated above regarding the acceptance of free construction services, we also find that the receipt of the waterline was for or because of official actions or actions to be performed, and was to be used by Hebert in the construction of his personal residence.

Therefore, we conclude that the Respondent violated §3 by accepting free construction services and waterline from James Chabot.

B. Section 23(b)(3)

The Petitioner alleges that, by entering a private commercial relationship with Arthur Amaral, a builder whom he regulated, Hebert acted in a manner that would cause a reasonable person to conclude that the builder could improperly influence him or unduly enjoy his favor in the performance of his official duties in violation of G.L. c. 268A, §23(b)(3). The Petitioner also alleges that, by accepting a discount, construction plans, waterline and labor from James Chabot and Thomas Grossi, builders whom he regulated, Hebert acted in a manner that would cause a reasonable person to conclude that the builders could improperly influence him or unduly enjoy his favor in violation of G.L. c. 268A, §23(b)(3).

Section 23(b)(3) of the conflict of interest law is the standards of conduct section and provides that

[n]o current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know:

(3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

The Commission has long held that §23(b)(3) is applicable where a public employee does, or may perform, actions in his official capacity which will affect a party with whom he has a significant private relationship. See e.g., *EC-COI-92-7; 89-16; In re Foresteire*, 1992 SEC 590; *In re Cobb*, 1992 SEC 576; *In re Garvey*, 1990 SEC 504; *In re Keverian*, 1990 SEC 460. The Commission has stated that

[w]e have recognized that the inherently exploitable nature of public employees' private business relationships with those under their jurisdiction presents serious problems even without an actual finding that the public employee actively solicited the business....In the Commission's view, the reason for this prohibition is two-fold. First, such conduct raises questions about the public employee's objectivity and impartiality. For example, if lay-offs or cutbacks are necessary, an issue can arise regarding who will be terminated, the subordinate or vendor who has a significant private relationship with the public employee, or another person who does not enjoy such a relationship. At least the appearance of favoritism becomes unavoidable. Second, such conduct has the potential for serious abuse. Vendors and subordinates may feel compelled to provide private services where they would not otherwise do so. And even if in fact no abuse occurs, the possibility that the public official may have taken unfair advantage of the situation can never be completely eliminated. Consequently, the appearance of impropriety remains.

EC-COI-92-7 (citing *In re Keverian*, 1990 SEC 460, 462). In *EC-COI-92-7*, the Commission reiterated that a written public disclosure from a public employee to his appointing authority was mandatory if the public employee was

in a position to take official actions regarding a private party with whom the public employee has a private business relationship. The disclosure should include facts indicating that the business relationship is entirely voluntary on the part of the private party and that the private party, not the public employee initiated the relationship, if the relationship commenced after the employee's public employment began. *Id.*

The Commission has also required a written disclosure under §23(b)(3) when the private business relationship is based, in large part, on friendship between the parties. For example, in *In re Keverian*, 1990 SEC 460, the House Speaker had a "50 year history of family, cultural, ethnic and friendship ties between" the House Speaker and a rug dealer who had a contract with the House Speaker's office. The dealer stored, cleaned and repaired the House Speaker's rugs, sold rugs to him at or slightly above cost, and allowed the Speaker to keep rugs on consignment for long periods of time without paying for them or returning them. *Id*. at 462. The Commission stated that "[w]hile the evidence indicates that [the dealer] was motivated by friendship in providing these favors, in the commission's view these personal ties and favors only serve to enhance the appearance of favoritism that arises when a public official has private dealings with a vendor who does business with his office." *Id*. at 463, n.2.

1. Arthur Amaral

The Petitioner has alleged that, by entering a private commercial relationship with Arthur Amaral, a builder whom Hebert regulated, the Respondent violated §23(b)(3). The Respondent asserts that, taking the evidence most favorable to him, a reasonable person could not conclude that Raymond Hebert was unduly influenced. The Respondent misses the point. Section 23(b)(3) is concerned with the appearance of a conflict of interest as viewed by the reasonable person, not whether the Respondent actually gave preferential treatment.[35/] The Legislature, in passing this standard of conduct, focused on the perceptions of the citizens of the community, not the perceptions of the players in the situation. As the Commission has recently stated, it "will evaluate whether the public employee is poised to act in his official capacity and whether, due to his private relationship or interest, an appearance arises that the integrity of the public official's action might be undermined by the relationship or interest." *In re Flanagan*, 1996 SEC 757.

Here, it is not seriously disputed that Hebert and Arthur Amaral had a longstanding friendship, which existed prior to Hebert's appointment as Building Inspector. In addition to this friendship, Hebert entered a private commercial relationship with Amaral to build his personal residence. According to Hebert, Amaral was going to control all aspects of construction except the financing. The price for construction would be $41,000-$45,000. This was a verbal contractual agreement. Hebert never received any bills or invoices from Amaral. Hebert testified that he paid Amaral by check and with substantial cash payments. Hebert estimates that he paid Amaral approximately $12,000 -$13,000 for his work.

Construction began on Hebert's house in late July or early August 1991. Amaral and his crew basically performed all of the construction. Amaral did the site work, helped clear trees, excavated the foundation hole, excavated the septic system holes, framed the majority of the house, hung the drywall, did the finish carpentry, built the decks. When Amaral stopped working at the site, the house was substantially complete.

At the same time that Amaral was building Hebert's house, he remained a builder who was subject to Hebert's regulatory authority. Hebert, as Building Inspector, performed inspections and issued permits in late September 1991 regarding Amaral's construction at 6 Harvey Street. Hebert testified that, while he was Building Inspector, he knew Amaral was a developer in town and he knew it was likely that Amaral would appear before him in the future, and he knew it was likely he would be required to inspect Amaral's projects. Based on this evidence, we find that a citizen in the community would reasonably question whether the objectivity and impartiality of the Building Inspector was clouded by this ongoing private relationship. See *EC-COI-92-7; In re Keverian*, 1990 SEC 460, 462.

2. Grossi and Chabot

Grossi and Chabot were builders who were subject to Hebert's regulatory authority in 1991. Hebert issued permits and inspected their properties. The builders had a financial interest in these inspections.

At the same time that Hebert was taking official actions which affected Chabot and Grossi's interests, he was privately accepting assistance with an appliance discount, free construction services, construction plans, and waterline for his personal residence. In the case of Chabot, he sought construction plans in the midst of an official inspection.

Concerning Thomas Grossi, as well as with Arthur Amaral, the appearance of favoritism was enhanced by the friendship between the two men. *See In re Keverian*, 1990 SEC 460, 463, n.2. While friendship may be a defense to a violation of §3, it can be the essence of a violation of §23(b)(3) as friendship raises questions about a public official's impartiality in the exercise of his official duties in matters affecting his friend.

Hebert's conduct in taking official actions affecting Grossi and Chabot while he was also accepting assistance from these builders in his private capacity would cause a reasonable person knowing these facts to conclude that these developers could likely enjoy Hebert's favor in the performance of his official duties.

3. Disclosure

Section 23, as well as the Commission's precedent, requires that a public employee, in order to dispel an appearance of a conflict, disclose the relevant facts, in writing, to his appointing authority. The disclosure serves to let the public know the relevant facts and permits the appointing authority to review the situation and take whatever steps he may deem to be appropriate to protect the public interest. No evidence of such a disclosure was entered in this case.

The Respondent asserts that the Petitioner has the burden of proving that no disclosure was made. We disagree and find that the burden of proof rests with the Respondent.

In *In re Cellucci*, 1988 SEC 346, the Commission considered that a written determination from one's appointing authority under §19(b)(1) was an exemption to be proven by the Respondent. According to the Commission,

> Were we to assign the burden of proof of the exemption to the Petitioner, such an allocation would be plainly inconsistent with the expressed intent of the original framers of G.L. c. 268A. In its Final Report, the Special Commission on Code of Ethics explained that the format they had chosen for the statute §was deliberately designed in order to avoid the necessity of indictment and proof which must carry the burden of negating all such possible exceptions and exemptions' and declared that §[i]t was the judgment of the Commission that the burden of proof of an exception or exemption should be on the public official who claims it.'

Id. at 349 (citations omitted).

In the common law, the general pleading rule applicable to all civil and criminal cases is "where the duty or obligation or crime is defined by statute, if there be an exception in the enacting clause, or an exception incorporated into the general clause, descriptive of the duty or obligation or crime, then the party pleading must allege and prove that his adversary is not within the exception; but if the exception is in a subsequent, separate or distinct clause or statute, then the party relying on such exception must allege and prove it." *Sullivan v. Ward*, 304 Mass. 614, 615 (1939); see *Murray v. Continental Insurance Company*, 313 Mass. 557, 563 (same); *Madden v. Berman*, 324 Mass. 699, 702 (1949) (burden of showing that defendant fell within proviso in statute was upon defendant).

In G.L. c. 268A, §23(b)(3), the language, " [i]t shall be unreasonable to so conclude (that a person would be unduly influenced or unduly enjoy a public employee's favor) if such...employee has disclosed in writing to his appointing authority...the facts which would otherwise lead to such a conclusion," is contained in a subsequent separate sentence from the standard of conduct. Applying the general pleading rule, the burden of proof would lie with the Respondent to demonstrate that he made a written disclosure to his appointing authority. This allocation of the burden of proof is also consistent with the legislative history of c. 268A.

The Respondent has not met his burden of proof in this case. The lack of a disclosure in relation to Amaral is particularly troubling as Hebert's agreement with Amaral was not in writing and numerous cash payments were exchanged. Given these circumstances, it would be very difficult for a member of the public to trace or discover the relationship, absent a disclosure.

Accordingly, we conclude that the Respondent has violated G.L. c. 268A, §23(b)(3) by accepting the builder's discount from Grossi, the plans, services, and waterline from Chabot, and by entering a private commercial relationship with Amaral to construct his personal residence, at the same time that he issued permits, conducted inspections and otherwise regulated these developers as Building Inspector. Raymond Hebert's actions would cause a reasonable person, having knowledge of all of the relevant circumstances, to conclude that these builders could unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of undue influence of

these builders.

IV. Conclusion

In conclusion, the Petitioner has proved by a preponderance of the evidence that Raymond Hebert violated G.L. c. 268A, §3 by accepting free construction services and waterline from James Chabot. The Petitioner has also proved, by a preponderance of the evidence that Raymond Hebert violated G.L. c. 268A, §23(b)(3) in relation to his public dealings with Arthur Amaral, Thomas Grossi, and James Chabot. We conclude that the Petitioner has not proven by a preponderance of the evidence that Raymond Hebert violated §3 by accepting construction plans from James Chabot and a builder's discount from Thomas Grossi.

V. Order

Pursuant to the authority granted it by G.L. c. 268B, §4(j),[36/] the Commission hereby orders Raymond Hebert to pay the following civil penalties for violating G.L. c. 268A, §3 and §23(b)(3). The Commission orders Raymond Hebert to pay $1,000 (one thousand dollars) for violating G.L. c. 268A, §3. The Commission further orders Raymond Hebert to pay a civil penalty of $2,000 (two thousand dollars) for his course of conduct with the three builders in violation of G.L. c. 268A, §23(b)(3). We order Mr. Hebert to pay these penalties totaling $3,000 (three thousand dollars) to the Commission within thirty days of his receipt of this Decision and Order.

DATE: April 29, 1996

[1/] Andrew Lawlor was the counsel of record during the adjudicatory hearing of this case. He left the Commission prior to the filing of briefs and argument. The new counsel of record for the Petitioner is Stephen Fauteux.

[2/] Commissioner Brown was the duly designated presiding officer in this proceeding. See G.L. c. 268B, §4(e).

[3/] In making findings regarding the building inspector's duties we credit the testimony of Mr. Hebert regarding his job responsibilities and the testimony of Paul Piepiora. We find that Paul Piepiora is qualified to render an opinion regarding the duties of building inspectors for the following reasons. Mr. Piepiora has served as a state building inspector for ten years. His duties as a state inspector include permit issuance and inspection of all state building projects within the assigned district, inspection and certification of state-owned facilities, and the provision of assistance to building inspectors in the assigned district. The Town of Norton is within his jurisdiction, and has been within his jurisdiction for nine years. Prior to his Commonwealth position, he served as an assistant and deputy building inspector for ten years. Mr. Piepiora also has private sector experience in framing, roofing, siding, interior finish, drafting and structural design.

[4/] We credit Hebert's testimony concerning his duties as the Norton Building Inspector.

[5/] We credit Hebert's testimony.

[6/] We credit Mr. Hebert's and Mr. Piepiora's testimony.

[7/] We credit the testimony of Mr. Hebert and Mr. Piepiora, as well as the testimony of Mr. Chabot and Mr. Coolidge.

[8/] In regards to this finding, we credit Hebert's testimony, as well as Grossi's, Chabot's and Coolidge's testimony.

[9/] We credit the testimony of David Lawrence Smith, the former manager of the Caloric Appliance Company discount warehouse. Based on his experience as manager and his experience working in the appliance industry, we find Mr. Smith to be competent and knowledgeable to testify regarding the practice of the industry. Ms. Lewis testified that she thought the discount she received for these appliances was $25-$50 per appliance, but on review of this testimony, we consider her estimate to be a guess, not reliable evidence.

[10/] In regards to his finding we credit Grossi's testimony. This testimony was corroborated through Agent O'Connor, an FBI agent who testified that, in an interview with Hebert, Hebert stated that Grossi purchased the stove, range hood, refrigerator, and dishwasher for Hebert's house.

[11/] In an interview with Agent O'Connor, Hebert stated that the cost was $950.

[12/] We credit Hebert's testimony in making this finding.

[13/] Mr. Chabot testified that J & R built 10-12 houses per year in Norton. Mr. Coolidge's estimate was 9-10 houses.

[14/] We credit Hebert's testimony in this regard.

[15/] We consider Chabot to be credible in his testimony on this point. We also credit his experience in the construction trade as a principal of J

& R who has built numerous houses.

[16/] Chabot was asked if he had hired framers on his job sites. He testified that he had hired framers at J & R and that he paid the framers "between $15 and $20 an hour, depending on the man." Twenty dollars per hour was paid to an experienced framer. We credit Chabot's testimony, based on his personal experience hiring framers in the construction trades and working in the construction trade.

[17/] The number of hours is based upon Chabot's testimony that he spent four hours putting up walls and twelve hours working on the second floor wall. Although Chabot spent some time pre-cutting parts, he was unable to provide a precise reliable figure. Because a reliable figure was not placed in evidence, the time for pre-cutting the parts is not included in this finding.

[18/] This figure is arrived at by multiplying the number of framing hours (16) by $20 per hour (framing rate).

[19/] We find Chabot's testimony credible on this point. Hebert testified that he purchased the original waterline. He testified that he did not receive free waterline from Chabot because he purchased waterline. However, he was not certain in his testimony whether Arthur Amaral ran out of waterline and solicited an additional amount. We do not find Chabot's testimony and Hebert's testimony inconsistent where Chabot testified that the amount Hebert had purchased was inadequate for the job.

[20/] We credit Chabot's testimony concerning value based on his cost, and his experience in the construction trade.

[21/] Agent O'Connor of the FBI testified at the adjudicatory hearing regarding five interviews he had with Arthur Amaral. Arthur Amaral asserted his privilege against self-incrimination at the hearing and did not testify, although he had been served with a subpoena. Our findings regarding the relationship with Arthur Amaral are based on Hebert's testimony at the hearing. We decline to give Agent O'Connor's testimony substantial weight as he did not have a strong personal recollection of the interviews and relied heavily on his notes and reports. Some of his testimony was multiple level hearsay and, because of an agreement the Petitioner had with the U.S. Attorney, cross examination of Agent O'Connor was limited.

[22/] We acknowledge that this figure is the subject of dispute between Hebert and Amaral, but we credit Hebert's testimony.

[23/] Hebert testified that he paid Amaral between $12,000 and $13,000. In evidence are checks to Amaral from Hebert totalling $2830.

[24/] Hebert issued Thomas Grossi an occupancy permit for 162 Woodland Road on July 24, 1991. He issued a building permit for 10 Island Road on July 3, 1991. He issued a foundation permit and a building permit for 6 Cedar Street on July 31, 1991. He issued J & R various permits for 312A South Worcester Street, 320A South Worcester Street, 5 Fordham Drive, and 115 Barros Street. He also issued permits to Arthur Amaral for 6 Harvey Street on September 30, 1991 and October 2, 1991. He admitted he had performed all of the applicable inspections associated with these permits.

[25/] According to the *Bustamante* court,

> To find a public official guilty of accepting an illegal gratuity a jury must find that the §official accepted, because of his position, a thing of value §otherwise than as provided by law for the proper discharge of official duty.' Generally, no proof of a quid pro quo is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office. (citations omitted).
>
> *Id.* at 940.

[26/] Hebert testified that "I think that Mr. Grossi did that as a favor to me, not because I was his building inspector but because I was his friend, and if he expected any more out of me because of that, then, he wasn't the friend that I expected him to be."

[27/] In evidence are seven permits Hebert issued to Grossi between April 17, 1991 and July 31, 1991. Grossi testified that he built three houses in Norton in 1991. He indicated that Hebert inspected homes he built on 10 Island Rd. and 10 Woodland Rd. These inspections and permits were issued in July 1991.

[28/] Because of the conclusion we reach on the nexus element, we decline to consider whether the opportunity to obtain a discount on the appliances was an item of substantial value.

[29/] The Petitioner, in its brief, argues that Hebert solicited free loam from Chabot and there was a great deal of testimony concerning the loam. Hebert denies this allegation. The Petitioner did not include this charge in the Order To Show Cause and the Commission never made a reasonable cause determination regarding this charge. We disagree with the Petitioner that we may read the Order To Show Cause broadly, in order to encompass this allegation. As a matter of due process, we decline to address this allegation.

[30/] We note that, if substantial value had been proven, we would have found a violation of §3 under these facts, particularly where Hebert solicited an item for his personal benefit at the same time as he exerted his official powers over the donor through an inspection. Here the requisite nexus has been established.

[31/] We agree with Chabot's opinion that he would be considered to be an expert framer, based on his experience in the construction trades.

[32/] Chabot testified that J & R built 10-12 houses in Norton each year during the 1990-1991 period.

[33/] Exhibit 6 lists the following J&R permits: building, foundation, occupancy permits for 312A South Worcester Street (June 25, 1991, June 25, 1991, September 4, 1991); building and foundation permits for 320A South Worcester Street (June 25, 1991; June 25, 1991); foundation, building and occupancy permits for 5 Fordham Drive (June 25,1991, June 25, 1991, Sept. 11, 1991); foundation, building and occupancy permits for 18 Fordham Drive (April 8, 1991, April 8, 1991, May 23, 1991); foundation, building and occupancy permits for 1 Island Road (Dec. 21, 1990, Feb. 1, 1991, Feb. 26, 1991); building and occupancy permits for 8 Fordham Road (Feb. 5, 1991, March 29, 1991); foundation, building and occupancy permits for 115 Barros Street (April 11, 1991, May 15, 1991, July 29, 1991); building permit and occupancy permit for 58 West Hodges Street (Sept. 24, 1990; Nov. 15, 1990).

[34/] J&R believed that the application of the veneer was a violation of the building code and the company did not want to be held liable for an accident as the owner had placed the stone after J&R finished building the house.

[35/] If preferential treatment was actually given, such conduct would raise serious concerns under G.L. c. 268A, §2, §3, and §23(b)(2).

[36/] The Commission has the authority under G.L. c. 268B, §4(j) to assess civil penalties of not more than two thousand dollars for each violation of G.L. c. 268A.